

1 UNITED STATES OF AMERICA
2 SOUTHERN DISTRICT OF ILLINOIS

3 CATHERINE ALEXANDER,)
4 Plaintiff,)
5 v.) No. 3:18-cv-00966-SMY
6 TAKE-TWO INTERACTIVE SOFTWARE,)
7 INC., et al.,)
8 Defendants.)

9
10 TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
11 (via video conference)

12 BEFORE THE HONORABLE STACI M. YANDLE
13 UNITED STATES DISTRICT JUDGE

14 January 24, 2022
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1 (Video conference proceedings began at 10:00 a.m.)

2 COURTROOM DEPUTY: The Court calls Case No. 18-966,
3 *Alexander versus Take-Two Interactive Software, Inc., et*
4 *a1*. This matter is called for final pretrial conference.

5 would the parties please state their presence for
6 the record, beginning with counsel for the plaintiff?

7 MR. SIMON: This is Tony Simon on behalf of the
8 plaintiff, from the Simon Law Firm.

9 MR. FRIEDMAN: This is Tony Friedman from the Simon
10 Law Firm for the plaintiff.

11 MR. TAHAN: Paul Tahan from the Simon Law Firm for
12 the plaintiff.

13 MR. CROMPTON: Seth Crompton from the Holland Law
14 Firm for the plaintiff. Sorry, Your Honor, I'm only on the
15 phone. I'm having connections issues. But the Simon Law
16 Firm will handle the talking. Thank you.

17 THE COURT: Okay.

18 MS. CENDALI: And for the defendant Take-Two
19 entities, Dale Cendali from Kirkland and Ellis.

20 MR. SIMMONS: This is Joshua Simmons with the same
21 entities, from Kirkland and Ellis.

22 MR. ILARDI: This is Chris Ilardi for the Take-Two
23 defendants, also from Kirkland and Ellis.

24 MS. MEANS: This is Miranda Means for the Two-Two
25 defendants, also from Kirkland and Ellis.

1 MR. ARNETT: Patrick Arnett, same entities, also
2 Kirkland and Ellis, Your Honor.

3 THE COURT: Okay.

4 MR. KRASIK: Good morning, Your Honor. Curt Krasik
5 from K & L Gates on behalf of defendant World Wrestling
6 Entertainment, Inc.

7 MR. NESTER: Good morning, Your Honor. Michael
8 Nester appearing on behalf of all defendants.

9 THE COURT: Okay. Good morning, counsel.

10 So, first things, first. It is simply not safe to
11 impanel a jury in the current COVID environment. And, you
12 know, I'm out of the expressions of, whatever. It just is
13 what it is. And so, as I indicated in my most recent
14 order, we're going to be forced to continue the trial in
15 this case once again.

16 As far as resetting the case, one of the issues is
17 that, as you know, jury trials and all trials have been
18 suspended for extended periods of time back and forth over
19 the last two years. Because of that, we currently have a
20 backlog of criminal cases that have to take priority
21 because of speedy trial issues. I currently have set --
22 even though I try -- I actually got in and tried 10
23 criminal cases between April and the end of the year. But
24 I have firm speedy trial dates on criminal cases for the
25 first quarter of this year. And as soon as we are able to

1 restart jury trials, I have to start slamming those back.

2 So, the bottom line is, we cannot get this case
3 back scheduled for trial before August, based on my current
4 docket -- trial docket. So, I have about five dates for
5 your consideration, and the first is August 8th. Let me
6 start with Mr. Simon on behalf of the plaintiffs.

7 MR. SIMON: Your Honor, unfortunately, as you can
8 imagine, other courts are having the same problems and --

9 THE COURT: Yes, I know.

10 MR. SIMON: So, that will not work for us because
11 we have another trial setting then.

12 THE COURT: Okay. What about August 22nd?

13 MR. SIMON: That works for the plaintiff, Your
14 Honor.

15 THE COURT: Miss Cendali, August 22nd for the
16 defendants -- or the Take-Two defendants?

17 MS. CENDALI: Thank you, Your Honor. I think Mr.
18 Nester was going to speak for all the defendants together,
19 if that's okay with you.

20 THE COURT: That's fine.

21 MR. NESTER: Your Honor, we did caucus in advance.
22 Your Honor, I would suggest to you, given our collective
23 calendars, that probably the month of September, if the
24 Court has dates in September, would be preferable for us.
25 And I can share those dates with you.

1 THE COURT: How about I share the dates with you
2 that I have available?

3 MR. NESTER: Understood, Your Honor. Understood.

4 THE COURT: Okay. So, let's look at September 6.

5 MR. NESTER: Your Honor, that is problematic for
6 us, September 6.

7 THE COURT: September 19.

8 MR. NESTER: Problematic.

9 THE COURT: That's all I have in September, so far.
10 Let me -- hold on.

11 MR. NESTER: Judge, I -- we have dates in October
12 that I can share with you, or you can provide me with your
13 availability and I can let you know whether those dates are
14 acceptable or problematic.

15 THE COURT: When you say problematic, there is
16 different levels of problematic. For me, conflicts with
17 your calendars or your schedules as it relates to trial
18 settings are a little bit more focused than problematic.
19 So, I'm assuming you are telling me that you all have
20 actual conflicts on those dates; right?

21 MR. NESTER: Yes, Your Honor. And again, I'm
22 speaking on behalf of all defendants. So, I have looked at
23 my calendar, Dale has looked at her calendar, as well as
24 other members of the Kirkland firm. Kurt Krasik has looked
25 at his calendar.

1 So, Your Honor, we have tried to winnow this down
2 to those dates when we are available such that we don't
3 have other conflicts, trial conflicts that would not permit
4 us to participate in the trial before this Court.

5 THE COURT: Okay. What about September 26?

6 MR. NESTER: We are available the week of the 26th
7 of September.

8 THE COURT: Mr. Simon?

9 MR. SIMON: That will work for the plaintiffs, Your
10 Honor.

11 THE COURT: Okay. So, we'll go with September 26
12 for a trial date. We will set a final pretrial for
13 September 14. And we'll make that September 14 at 9:30.

14 MR. NESTER: Thank you, Your Honor.

15 THE COURT: And again, the anticipation is that
16 will occur by Zoom.

17 MS. CENDALI: Thank you, Your Honor.

18 THE COURT: Now, having gotten that out of the way.
19 In preparing for this morning and going through the docket,
20 the submissions, the bottom line is -- and I do not mean
21 this as a personal affront to any of you. But if I can
22 give you an analogy, trying to sort through the docket and
23 the submissions and where we are and what we actually need
24 to be dealing with, and how this -- the posture of this
25 case moving forward to actually being ready to be tried in

1 a way that makes sense, sort of felt like to me, and I have
2 a -- at least one of my neuroses is one of these clutter
3 things. Where, if I walk into a room or a house that's
4 cluttered, I can't see my way through what I'm supposed to
5 be focusing on. And that's the feeling I got here. Again,
6 this is no personal affront. There's a lot of reasons for
7 it.

8 You know, this case has been set and reset. The
9 parties have submitted different versions of different
10 submissions and documents. The motions in limine were
11 filed before I ruled on dispositive motions and *Daubert*
12 motions. So, there is just a lot of clutter. And for me,
13 we need to take the opportunity and take advantage of the
14 time that we now have with the new trial setting to get
15 things cleaned up, to get things back on track and,
16 hopefully, to get the docket and status of the written
17 submissions in a position where they are workable and where
18 they are done basically so that we can move forward with
19 trying this case according to my procedures and my
20 approach.

21 So, we're going to use this time today to do some
22 housekeeping, and I'm going to give the parties some
23 instructions as far as how we can get this cluttered house
24 cleaned up.

25 The first issue I want to talk about is the status

1 of the 26(a)(3) disclosures, objections, et cetera. So,
2 plaintiffs, the operable 26(a)(3) for plaintiffs is the
3 Amended 26(a)(3) Disclosures that was filed at Document
4 253, and that's okay. That form and that submission is
5 fine.

6 The defendants filed a response to those amended
7 disclosures. I think it was in the last couple of weeks.
8 That's at Document 255. That pleading has a main document
9 and four exhibits. The first issue is that the exhibits
10 are all over the place. We have one exhibit that purports
11 to be a Final Pretrial Order submission; we have deposition
12 designations attached to, or objections to deposition
13 designations, attached to the main document; we have
14 counterdesignations attached to the main document; and,
15 then we have an exhibit list attached to the main document.

16 This is how I need this to happen and this is what
17 I am instructing the defendants to do. I'm requesting that
18 you withdraw Document 255, or I can strike it, whatever
19 your preference is. But that should be withdrawn. And
20 refile pretty much just the main document with your
21 objections.

22 And so, that brings me to a discussion of the Final
23 Pretrial Order. The Final Pretrial Order that is attached,
24 I guess it's a joint order, but it's different than the
25 first amended order as far as, there were motions in limine

1 that were shown as withdrawn in the order that I have, that
2 everything's back on the table in this order, and I'm just
3 not sure where everything is.

4 The other thing is, the Proposed Final Pretrial
5 orders that the parties have been submitting are not proper
6 or acceptable to me in terms of what the purpose of the
7 Final Pretrial Order is. The Final Pretrial Order is not
8 an opportunity for the parties to go back and forth with
9 their respective or divergent positions on issues. That's
10 not the purpose. The purpose is a document or order that
11 sets forth succinctly these various areas of the trial and
12 the parties' agreements in regard to certain things.

13 So, for instance, as I look at the Final -- or the
14 Amended Final Pretrial Order that I was given, on almost
15 every section we have a defendant's proposed position and a
16 plaintiff's position. That is not acceptable.

17 And so, for instance, the nature of the case. The
18 Court's standard routine order that should be used as a
19 template sets it out. The parties should prepare a brief
20 statement of the nature of the case, including the claims
21 of the parties. Not the respective -- I mean, bottom line
22 is, this is something simple that would be read to the
23 jury. "The plaintiff in this case makes the following
24 claims; the defendant disputes." I mean, it's very -- you
25 know, very vanilla in that way. Not a situation where,

1 again, we have disputes based on the questions of law.

2 That's not what this is.

3 Agreed issues of the law. The Amended Final
4 Pretrial Order has like 10 subsections of everybody -- of
5 both sides' different version of what the issues are.
6 That's not what this is for. I mean, the issues of law are
7 basically, you know, whether plaintiff -- or whether
8 defendants engaged in copyright infringement and whether
9 plaintiff had suffered any damages. Those are the issues.

10 I mean, and so, the way that you all attach -- and
11 again, this is not meant to be a criticism or to offend you
12 guys. I get it. But basically, I think what we have in
13 this case is, understandably, we've got very aggressive and
14 vigorous advocates for their respective parties, but that
15 need not show up in every submission or pleading. That's
16 not appropriate. And again, it triggers the Court's
17 clutter neuroses and I can't get through it, and it's
18 unnecessary.

19 So, I'm really asking you guys, between now and
20 when we -- and September, as you work through these final
21 pretrial issues, you know, file your teeth back some, at
22 least enough that will allow you all to make these
23 submissions in the proper scope and in the proper form.

24 So, the other thing on the Final Pretrial Order.
25 Damages. The Final Pretrial Order asks for an itemization

1 of a statement of the damages. That's pretty much
2 plaintiff's itemization of the claimed damages. We don't
3 need to go back and forth with arguments about disgorgement
4 and arguments about whether plaintiff can establish them or
5 -- you know, arguments that I have already addressed and
6 resolved by way of summary judgment. So, that's not --
7 again, I guess, this is not a platform for you guys to just
8 continuously articulate your respective and divergent legal
9 positions on the issues. That's not what this is for.

10 Finally, I would ask that you use the Court's form
11 "Final Pretrial Order" without deviation. The parties in
12 this case, in the First Amended Pretrial Order, which was
13 the last one submitted to the Court through e-mail, you
14 actually added a section called "other matters." There is
15 no "other matters" section in my Final Pretrial Order. So,
16 again, I hope you get what I'm saying, but that would keep
17 that focused.

18 So, let's talk about the 26(a)(3) disclosures for a
19 minute. As I indicated -- so, what I have is, plaintiff's
20 First Amended 26(a)(3) is at Document 53. I am asking
21 defendants to withdraw their response to those, which is at
22 Document 255, and refile the response, which basically
23 would consist of your main document without these
24 attachments.

25 Defendants' Amended 26(a)(3) Disclosures were filed

1 at Document 243. They are okay, with the exception of
2 Exhibit A, which is the deposition designations. And the
3 reason that I'm asking you to withdraw those is because I
4 want you guys to handle the deposition designations in a
5 whole different way. So, whatever designations and
6 objections you've submitted at this point, consider them
7 moot.

8 And this is the way I want you to handle them: I'm
9 going to ask that the parties submit the deposition
10 designations, objections, counterdesignations and any
11 objections to the counterdesignations, in one joint
12 document. In other words, for deposition of this witness,
13 the defendant designates these portions; the plaintiff
14 asserts these objections. You know, and then, moving on.

15 I'm going to have my law clerk, Michelle, to
16 actually send you a sample in the format that I am talking
17 about for you guys to use. And so, you will have time
18 between now and September to get together. You have to
19 meet-and-confer on it; work out any objections that you
20 can. But in the final instance, submit the designations,
21 objections, and counterdesignations and objections, in one
22 joint document, so I can go to one place and know, here
23 they are for this deposition.

24 Also, submit by e-mail the actual depositions that
25 are in question. Not portions, but the whole deposition,

1 so that I can look at it in context if I need to.

2 Again, we'll send you the form or the format that I
3 would like for that to be in. And basically, I would ask
4 that that document be submitted by e-mail seven days before
5 the final pretrial conference. Okay?

6 Exhibit lists. There is two places where this
7 comes into play. Obviously, the parties can and have
8 objected in their 26(a)(3) submissions, so objections to
9 26(a)(3) exhibits. But they're in different places and in
10 different forms and formats.

11 So, I think plaintiffs have attached the form or
12 attached as an exhibit or amended it to their 26(a)(3)
13 objections, and I'm fine with that.

14 The defendants, you also attached a document, I
15 think as Exhibit 4, objections to the exhibits. A couple
16 of things. I would ask that you keep your objections to a
17 brief expression of the legal objection: Relevance, Rule
18 403, whatever it is. Again, try to stay away from any
19 extended arguments on paper. That's not needed. All I
20 need is your legal objections.

21 Let me state which should be obvious: Improper
22 characterization or labeling or entitling of an exhibit is
23 not a legal objection. It doesn't have any legal basis.
24 It's not practical or useful. That is not a legal
25 objection. I'll ask that you state your legal objections.

1 The fact that an exhibit is multiple photographs, that's
2 not a legal objection. So, tell me relevance, tell me Rule
3 403, tell me something that is actually a legal objection.

4 The other thing I would say to the defense? When
5 you resubmit -- because I'm going to strike Exhibit 4.
6 When you resubmit your objections to the exhibits, to the
7 26(a)(3) exhibits, could you do it in your basic format of
8 the way that they presented it? "This is our legal
9 objection."

10 To be honest with you, the format that you guys
11 have submitted and filed with codes and a legend is totally
12 -- is not practical or helpful. I mean, I feel like I need
13 a roadmap to figure that out. That's not -- that's not a
14 proper form. It's real simple. Plaintiffs have named
15 their exhibits; you state whether you have an objection and
16 what the legal basis of that objection is, simply and
17 concisely.

18 As it relates to the Final Pretrial Order. I will
19 remind the parties that, separate and apart from the
20 26(a)(3), there is a section on exhibits in the Final
21 Pretrial Order which I'll ask that you follow without
22 deviation. And that is, the parties are to prepare and
23 append to the Final Pretrial Order a Pretrial Exhibit
24 stipulation that includes the numbered list of trial
25 exhibits and any objections. So, that also needs to be

1 made part of the Final Pretrial Order.

2 And again, the Second Amended Final Pretrial Order
3 should be submitted according to the case management
4 procedures, whatever dates are triggered by that. I think
5 -- is it seven or three days before the final -- seven days
6 before final pretrial? Whatever that time is, that's when
7 you'll have to submit the last Amended Final Pretrial Order
8 without respective arguments.

9 So, that's that.

10 On the motions in limine. I had anticipated ruling
11 on those today but, once I got into them I realized again,
12 I walked into another cluttered room. And the cluttered
13 room is -- again, it's no criticism to you. But as I said,
14 the motions in limine were filed before I made rulings on
15 summary judgment and *Daubert* -- and the *Daubert* motions.
16 And so, many of the motions or a substantial part of many
17 of the motions involves or includes, again, the respective
18 legal arguments that are more of a summary judgment in
19 nature. And so I don't have to sort through that, I'm
20 going to ask that you withdraw your current motions in
21 limine -- or I will strike them -- and I'll ask you to do
22 two things. In light of my rulings on the motions for
23 summary judgment and the *Daubert* order, I'll ask both
24 parties to revisit whether they really want to resubmit the
25 same objections or similar objection or, I believe, are

1 moot. Now, I can rule on that, but it seems that I
2 shouldn't have to, if it's obvious that they're moot.

3 And I guess one thing that I would say to both
4 parties: There are -- most evidentiary issues can really
5 not be preemptively ruled on in a vacuum. Most evidentiary
6 rulings need to be made in the context of trial and, and --
7 because, you know, the factual background of what's
8 happening is going to determine that.

9 Motions in limine should really be used, you know,
10 as far as so that you can have me determine relevancy of
11 specific evidence that is really in dispute beforehand.

12 Some of the motions in limine ask me to exclude
13 vague categories of evidence, statements, documents, that
14 there is no way that I can make a ruling on a broad
15 category of statements or documents. If a party has a
16 specific piece of evidence or a specific statement in mind
17 that they really believe is irrelevant and that I should --
18 and that I can and should rule on before it comes out
19 through the course of trial, identify that.

20 But, you know, to say the Court should exclude any
21 statement that may talk about social media, that's not
22 something practically that I can rule on. That's not
23 something that I can preemptively rule on. And I -- and
24 again, I think it just really goes to you-all's
25 understandable but vigorous advocacy. I don't need to see

1 that in motions in limine because that's not really what
2 this is about.

3 So, I'm going to ask that the parties withdraw the
4 current motions in limine and refile them again. You can
5 refile them according to the new time frame that's
6 triggered by the new trial date. But I would ask that you
7 take the time to review your previous submissions. Decide,
8 is this really a motion in limine? Do you really want to
9 submit this? Reach out to each other, see if you can
10 resolve some of them. And then, hopefully, when I walk
11 back into the house for the continuation of the final
12 pretrial, I'll at least be able to walk into one room
13 without freaking out because it's so cluttered.

14 Any questions?

15 MS. CENDALI: Understand, Your Honor. Thank you.

16 THE COURT: And again, look, I get it. But I think
17 you get it, too. And a lot of it is, again, because of how
18 things have -- the continuances and everything, to
19 you-all's credit, even though the -- my ruling on the
20 dispositive motions and *Daubert* were pending, you went
21 ahead and did what the deadlines told you to do. But I
22 think you understand how a lot of that stuff is mooted. It
23 may not be mooted in your mind because you disagree with my
24 rulings, but the rulings are the rulings. And so, whether
25 or not -- and so whether it's relevant, it makes it moot.

1 All right. Anything else?

2 MR. NESTER: I don't think so.

3 MS. CENDALI: I don't think so, Your Honor, on
4 behalf of the defendants.

5 THE COURT: And so, my excellent law clerk,
6 Michelle, is going to draft an Order reflecting the rulings
7 that I made today and what I have asked you guys to do, so
8 you don't have to get the transcript to figure that out.
9 If you want to get the transcript, that's on you. But I'm
10 going to detail them in the Order so you have the guidance
11 there, combining it with the Order that sets the new trial
12 date, et cetera.

13 MR. SIMON: Thank you, Your Honor.

14 MR. NESTER: Yes, Your Honor.

15 THE COURT: Everybody, please stay safe and be
16 well. We're going to get this done one day. But right
17 now, COVID is kinda running things.

18 Okay. Thank you.

19 (Court adjourned at 10:39 a.m.)
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REPORTER'S CERTIFICATE

I, Christine Dohack LaBuwi, RDR, CRR, Official Court Reporter for the U.S. District Court, Southern District of Illinois, do hereby certify that I reported with mechanical stenography the proceedings contained in pages 1-21; and that the same is a full, true, correct and complete transcript from the record of proceedings in the above-entitled matter.

DATED this 31st day of January, 2022,

s/Christine Dohack LaBuwi, RDR, CRR

Christine Dohack LaBuwi, RDR, CRR